IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 61369-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JAMIE WALLIN,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: May 18, 2009
	)	

Lau, J. — Wallin challenges his convictions for two counts of first degree child rape and two counts of first degree child molestation. He argues that testimony from two witnesses should have been suppressed because it was tainted by an illegal search. We reject this argument because the evidence was sufficiently attenuated from the search to be purged of the primary taint. Wallin also argues that two of the counts should have been dismissed under CrR 4.3.1's mandatory joinder rule because they should have been joined for trial with his previously adjudicated crimes. But we conclude that the crimes do not constitute "related offenses" since they are not based on the same criminal conduct as the previously adjudicated crimes. We affirm.

FACTS

Jamie Wallin was convicted of first degree child molestation in 1995. He was sentenced under the Special Sexual Offender Sentencing Alternative (SSOSA), but after he violated the program's requirements, his SOSSA was revoked. He served a 51-month prison sentence before being released in 1998. In 1999, he violated his community placement conditions and the court extended his community placement to 10 years. But at the time, the deputy prosecuting attorney, the defense attorney, and the court erroneously believed the statute authorized the extension of Wallin's community placement.

In March 2003, community correction officers searched Wallin's computer without a warrant. They found child pornography, which police used to obtain search warrants for his computer, floppy discs, and camera. The searches ultimately led to the discovery of photographs depicting an adult male molesting and raping a minor female. Wallin admitted to police that he was the male in the photographs and that the female was A.R. In a stipulated bench trial, the court convicted Wallin of molesting A.R. on January 25, 2003, and raping her on February 22, 2003. The conviction was based on two photographs stamped with these dates, combined with Wallin's admissions. Five additional photographs date stamped between December 25, 2002, and January 25, 2003, were not used, but were included in discovery.

On appeal, this court reversed the judgment and sentence because the 1999 extension of Wallin's community placement was improper, which rendered the initial warrantless search of his computer illegal

under article 1, section 7 of the Washington Constitution. State v. Wallin, 125 Wn. App. 648, 651, 105 P.3d 1037 (2005). Because the critical evidence was uncovered as a result of the illegal search, it constituted "fruit of the poisonous tree" and had to be suppressed. Wallin, 125 Wn. App. at 662–63. After this decision, the charges against Wallin were dismissed with prejudice, and he was released from prison.

Throughout this period, A.R. never disclosed abuse to her mother or authorities. However, in April 2007, A.R.'s mother learned that her daughter, then 13, was having sexual relations with a 21- or 22-year-old male. A criminal investigation resulted and during this investigation, A.R. disclosed that Wallin had raped her when she was nine years old. In a second interview, A.R. stated that Wallin had engaged in numerous sexual encounters with her in 2002 and early 2003. A.R. and her family lived in Marysville and Everett during this time.

In the meantime, Wallin was accused of committing new sexual crimes against children in August 2006.[1] While these charges were pending, Wallin's girl friend wrote a letter to Brandon Boulton, who had become friends with Wallin when he was in prison based on the 2003 charges. After learning of the new accusations, Boulton offered to share information about Wallin with the Snohomish County Prosecutor's Office. Boulton subsequently disclosed that Wallin had admitted molesting A.R. The State was not aware that Boulton had information about Wallin until he came forward on his own.

[1] The jury convicted Wallin of 11 of the 12 charges, and in an unpublished opinion filed March 9, 2009, this court affirmed the convictions.

In June 2007, the State charged Wallin with two counts of first degree child rape and two counts of first degree child molestation, with A.R. the alleged victim for each count. By amended information, the State alleged that one count of rape and one count of molestation occurred when A.R. lived in Marysville, with a charging period of August 1, 2001, to August 13, 2002. The amended information alleged that the other two counts, counts III and IV, occurred after A.R. and her family moved to Everett, with a charging period of August 13, 2002, to January 15, 2003. Thus, the charging period for counts III and IV ended 10 days before the first photograph used to support the 2003 convictions was taken.

While Wallin was in custody pending trial for the alleged 2006 offenses, he became friends with Gabriel Rohweder, who was also incarcerated on sex offense charges. In August 2007, Rohweder came forward to report that Wallin had made admissions to him about molesting A.R. The State was not aware that Rohweder had information about Wallin until he came forward on his own.

Prior to trial, Wallin moved to exclude "every piece of evidence" in the case as fruit of the poisonous tree. In particular, he argued that his statements to Boulton and Rohweder were tainted by the illegal 2003 search. The trial court denied the motion, concluding that the evidence was sufficiently attenuated from the original illegal search to be admissible. Wallin also moved for dismissal of counts III and IV under CrR 4.3.1. He argued that the rule barred the State from trying him for these offenses after electing not to do so in the first trial because the offenses were "related." The court denied the motion, concluding that joinder would not have been mandatory because the offenses were not "related" as they arose

from incidents occurring on different days, separated in time from each other.

None of the photographs derived from the illegal 2003 search was used in the 2007 trial, but Boulton and Rohweder testified against Wallin. The jury convicted Wallin as charged. The court sentenced him to four terms of life without parole, and he now appeals.

ANALYSIS

Suppression

Wallin argues that his statements to Boulton and Rohweder should have been suppressed because they were tainted by the original illegal search in 2003. He points out that he was in prison because of the illegally obtained photographs, so his admissions while in prison were at least indirectly derived from this illegality. But not all evidence must be suppressed as

> "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the primary illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (quoting John M. Maguire, Evidence of Guilt, at 221 (1959)). To show that evidence has been purged of taint, the State has the burden of establishing "(1) intervening circumstances have attenuated the link between the illegality and the evidence; (2) the evidence was discovered through a source independent from the illegality; or (3) the evidence would inevitably have been discovered through legitimate means." State v.

Tan Le, 103 Wn. App. 354, 361, 12 P.3d 653 (2000) (footnotes omitted).

Here, the trial court concluded from the undisputed evidence described above that Wallin's statements to Boulton and Rohweder. were sufficiently attenuated from the 2003 search to be admissible. This is a conclusion of law, which we review de novo. State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). Factors relevant to attenuation include temporal proximity between the initial illegality and the discovery of the allegedly tainted evidence, the existence of intervening circumstances, and the purpose and flagrancy of the illegality. Tan Le, 103 Wn. App. at 362.

These factors support admission of Wallin's statements. Wallin's admissions to Boulton did not occur close in time to the illegal search. Wallin confided in Boulton months later, and his admissions to Rohweder occurred years after the illegal search. Thus, the illegal search and Wallin's statements were temporally disconnected. Additionally, between the search and the time of Wallin's statements to Boulton, Wallin was arraigned, assigned counsel, and went through a trial. As part of these legal proceedings, he was advised of his rights and had the benefit of counsel. These intervening circumstances substantially dissipated the link between the search and Wallin's statements to Boulton. See Tan Le, 103 Wn. App. at 362 (noting that legal proceedings such as bringing a defendant into court can serve as intervening circumstances that purge the taint of illegal conduct). Additional circumstances intervened before Wallin admitted to Rohweder that he had molested A.R., including his rearrest on new child sex charges.

Finally, the initial illegal search did not result from flagrant official misconduct. As we explained in our prior opinion,

when Wallin's community placement was extended, the court, the deputy prosecuting attorney, and the defense attorney all believed that the extension was statutorily authorized. Wallin, 125 Wn. App. at 652. Because this belief was erroneous, the community correction officers' initial search of Wallin's computer in March 2003 was illegal. But there was no intentional wrongdoing, so this factor also supports attenuation.

In addition to these factors, a witness's exercise of free will in providing evidence to the State also acts to attenuate the evidence provided from the official misconduct. State v. Childress, 35 Wn. App. 314, 316, 666 P.2d 941 (1983). Here, Boulton and Rohweder voluntarily came forward to report Wallin's confessions. The State was not aware that they had any information about Wallin until they came forward on their own. The independent choice by these witnesses to reveal Wallin's statements provides further support for the trial court's conclusion.

Under these circumstances, Wallin's statements to Boulton and Rohweder were sufficiently attenuated from the original illegal search in 2003 to be admissible. Wallin's suppression argument fails.

Mandatory Joinder[2]

Prior to the 2003 prosecution, the State possessed evidence that Wallin raped

[2] The State contends that Wallin abandoned his mandatory joinder argument by not seeking a final ruling from the court on the issue. But the record includes a clear request by Wallin's counsel for a ruling on the mandatory joinder argument and the court clearly responded by denying his motion for dismissal on this basis, so we reject the State's abandonment argument.

and molested A.R. on multiple occasions between August 13, 2002, and February 22, 2003, when she lived in Everett. But in the 2003 case, the State charged him based only on photographs dated January 25, 2003, and February 22, 2003. Wallin now argues that CrR 4.3.1 precludes the State from bringing the rape and molestation charges in counts III and IV because the State could have and should have brought them in the first trial.

CrR 4.3.1(b) makes joinder of "related offenses" mandatory. State v. Downing, 122 Wn. App. 185, 190, 93 P.3d 900 (2004). If the State attempts to try a defendant for an offense that is related to an earlier offense for which the defendant has already been tried, the court generally must dismiss the new charge upon a timely motion by the defendant.[3] CrR 4.3.1(b)(3). Under the rule, offenses are "related" only if they are "within the jurisdiction and venue of the same court and are based on the same conduct." CrR 4.3.1(b)(1); see also State v. Lee, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997) (the purpose of the rule is to protect defendants from multiple prosecutions based upon "essentially the same conduct."). The "same conduct" for purposes of applying the rule is conduct involving a single criminal episode or incident. Lee, 132 Wn.2d at 503.

In Lee, this court noted that close temporal and geographic proximity of the

[3] There are some exceptions to this general rule—dismissal is not required when the court determines that the prosecutor was unaware of facts constituting the related offense, the prosecutor did not have sufficient evidence to warrant trying the related offense at the time, or "for some other reason the ends of justice would be defeated if the motion were granted." CrR 4.3.1(b)(3). It is not necessary to address these exceptions here.

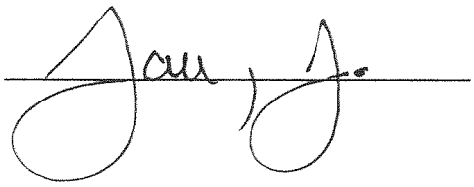
offenses is generally present and that if the offenses are based on the same physical act or series of physical acts, they are part of the same criminal incident or episode. Lee, 132 Wn.2d at 503. The court also noted that the same criminal episode could span a period of hours "or even days" if it involved a continuous series of criminal acts such as a robbery, kidnapping, and assault on one victim. Lee, 132 Wn.2d at 503–04. But offenses involving distinct incidents are not the "same conduct." Lee, 132 Wn.2d at 504.

For example, in Downing, the defendant passed several bad checks over a two-month period, resulting in multiple charges for the unlawful issuance of bank checks. Downing, 122 Wn. App. at 187. One of the issues on appeal was whether CrR 4.3.1 required dismissal of one of the charged offenses because it had not been joined with another offense against the same victim. The court concluded that "joinder was not mandatory because the charges involved different checks issued on different dates and because one crime was completed before the next began." Downing, 122 Wn. App. at 191. Thus, while it is possible for a single criminal episode to extend over a period of hours "or even days" when based on a continuous series of criminal actions, if there are distinct criminal incidents disconnected from one another in time, they do not constitute the "same conduct" for purposes of CrR 4.3.1 even if they involve the same victim and are the same kind of crime.

Here, Wallin contends that the trial court should have dismissed counts III and IV because those offenses were the "same conduct" for which he was charged in 2003. He relies on State v. Dallas, 126 Wn.2d 324, 329–30, 892 P.2d 1082 (1995), in which the court dismissed a theft charge the

State chose not to bring in the original information. There, the court concluded that the theft offense was related to the possession of stolen property offense because the two charges stemmed from the same conduct. Dallas, 126 Wn.2d at 329. But in that case, the basis for both charges was a single criminal incident—the defendant took a Walkman cassette tape player from her friend's sister. Dallas, 126 Wn.2d at 327. In contrast, Wallin's actions toward A.R. occurred on different occasions, separated by significant breaks in time. The charging period for counts III and IV ended 10 days before the rape and molestation incidents he was convicted of in 2003, so the new rape and molestation convictions were necessarily for actions that occurred at least 10 days earlier. Moreover, the abusive conduct was not simply one action or continuous series of actions over a 10-day period. There were distinct criminal incidents disconnected in time. Thus, as in Downing, "one crime was completed before the next began." Downing, 122 Wn. App. at 191. The trial court properly found that these offenses were not the "same conduct" under CrR 4.3.1.

Affirmed.



WE CONCUR: